In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 207

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

TEX-PENN OIL COMPANY

No. 208

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

M. L. BENEDUM

No. 209

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

F. B. PARRIOTT

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The brief on behalf of respondents contains several statements to which we desire to make reply.

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I

THE RECORD DOES NOT SUPPORT THE ASSERTION IN RESPONDENTS' BRIEF THAT A RESIDUE FROM THE $350,000 PAID TO TEX-PENN BY TRANSCONTINENTAL WAS PAID BACK TO THE FIVE ASSOCIATES

With respect to the disposition of the $350,000 paid by Transcontinental to Tex-Penn the respondents, on page 17 of their brief, say:

> If the $350,000 rightfully belonged to Tex-Penn as part of the consideration received for the transfer of its assets, as the Government contends and as the Board found, any residue from this fund not needed would have been paid to Benedum and Parriott *alone* as joint sole stockholders of the Tex-Penn Oil Company, in accordance with their proportionate stock ownership. *The decisive fact is, however, that it was paid to the five individuals in proportion to their individual interests in the Duke-Knoles leases* (R. 94, F. [illegible]). [Italics supplied.]

We think it important to point out that the "decisive fact" referred to in the last sentence above does not exist. The record affirmatively shows that the moneys paid back to the five associates were paid out of a trust fund of $286,891.29, designated the "Tex-Penn Indebtedness Fund". This trust fund had been set up pursuant to the original contract between the five associates and Tex-Penn. (R. 1799, Ex. 11; R. 66, F. 12.) In this instrument the entire leasehold interest of the five associates in the Duke-Knoles fields were conveyed to Tex-Penn. Thereafter they reserved a five-

eighths portion of that interest to themselves, subject, however, to a provision that "there shall be paid unto the said F. B. Parriott, who is one of the said parties to these presents, five-sixteenths of the proceeds derived from the sale of oil, natural gas and gasoline under these presents, who shall apply the same to the payment of the indebtedness of the said party of the second part in the way and manner following, that is to say * * *" (R. 1800), to pay such debts of Tex-Penn as it was unable to pay. There follows a provision for the semi-annual accounting of the money received and the expenditures and indebtedness of Tex-Penn and a provision that if there is any balance of the fund it shall be retained for the owners.

That fund was known as the "Tex-Penn Indebtedness Fund". At the time of the transfer it amounted to $286,891.29. (R. 1830, Ex. 26.) It was out of that fund that the refund of $55,255.24 was made to the owners (R. 94, F. 59; R. 1830) according to the express terms of the agreement between Tex-Penn and them, entered into long before the transactions in this case.

II

RESPONDENTS ASSERT THAT THERE IS NO EVIDENCE TO SUPPORT THE FINDING THAT $350,000 WAS PAID TO TEX-PENN ASIDE FROM THE RECITALS IN THE DOCUMENTS CONTEMPORANEOUS WITH THE SALE OF THE TEX-PENN ASSETS

In making this assertion respondents overlook the fact that Tex-Penn was the owner of an equi-

table claim on the five-eighths interest reserved to the individuals. It is clear in the instrument of October 31, 1918, conveying the Duke-Knoles leases to Tex-Penn, that the individuals did not reserve to themselves the entire five-eighths interest. It was provided that proceeds derived from the sale of five-sixteenths of the five-eighths interest in oil reserved should be paid to Parriott as trustee. (R. 1800.) Parriott was required to pay the indebtedness of Tex-Penn semiannually out of these proceeds and to distribute to the individuals only the balance. To put it briefly, this right to keep a portion of the five-eighths interest reserved up to the amount of its indebtedness was a valuable asset of Tex-Penn. There is no question but that the $350,000 was paid to Tex-Penn in order to extinguish its claim, equitable interest or property right in the five-eighths interest, to accomplish which it was essential that its debts be paid. This is evidence of a very clear and convincing character that the $350,000 was paid to Tex-Penn in consideration for its assets.

The existence of Tex-Penn's equitable interest in the five-eighths overriding royalty reserved to the individuals is evidence which may well be considered to explain what respondents call inconsistency in the amounts. (Br. 21.) The total consideration for the five-eighths interest appears by the record and is asserted by the respondents (Br. 7) to be $9,000,000 for the reserved five-eighths

interest. Since Tex-Penn owned or had an equitable claim in a portion of that five-eighths interest, there is nothing inconsistent in distributing to Tex-Penn out of the $9,000,000 a sufficient sum to extinguish its equitable interest.

III

THE PETITIONER IS NOT FORECLOSED FROM CLAIMING THAT UNDER THE RESPONDENTS' THEORY OF THE CASE THERE WAS NO REORGANIZATION

Respondents in their brief state (p. 65):

> Taxpayers are entitled to know with certainty the basis of the claim asserted against them and new grounds may not be advanced after the parties have framed their proof to meet the Commissioner's proposed assessment.

We wish again to point out that our position is that the findings of the Board are based on substantial evidence and that the court below erred in setting them aside. The fact that this is our position, however, does not prevent us from pointing out that even if the respondents' theory is assumed to be correct the transaction is not tax-exempt. It is familiar law that the decision of a lower tribunal, if sustainable on any theory, should stand. Of course, the Court may, in its discretion, decline to consider the points, as it did in *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378. This, however, we do not construe as prohibiting us from presenting the points to the Court for such consideration as

and still contend that the court below misapplied and extended the decision of this Court in *Helvering* v. *Taylor,* 293 U. S. 507.

V

THERE IS NO EVIDENCE IN THE RECORD THAT THE COMMISSIONER AGREED THAT THESE TRANSACTIONS WERE NOT TAXABLE

In their brief respondents make the following assertion (pp. 26–27):

> Before the transaction was undertaken, Benedum, realizing the uncertainty of the income tax law at the time, insisted that his counsel together with counsel for the Bankers, take the matter up with the Commissioner of Internal Revenue to determine whether any tax would result from the transaction. The attorneys made two trips to Washington and reported to Benedum that "the Commissioner had agreed that this was not a taxable proposition" (R. 612, 613).

Such an assertion we do not think is material to the issues of this case, but nevertheless an implication might be drawn therefrom that the Commissioner had acted either negligently or in bad faith in preliminary negotiations. We think, therefore, that it is most important to call the attention of the Court to the fact that the testimony on which the assertion is founded was not only hearsay but was stricken from the record (R. 612–613). Therefore, the Commissioner has

had no opportunity to explain his version of these conversations. It would be obviously improper for us to state in this brief what the Commissioner's position in those preliminary negotiations was or whether the proposition put up to the Commissioner was the same as the actual transaction which occurred.

Respectfully submitted.

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